IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 32870/32905

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 664**
	)	
Plaintiff-Respondent,	)	**Filed: September 30, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
BRANDON JOHN TOLER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. N. Randy Smith, District Judge.

Order denying motion to suppress evidence, affirmed. Sentences and order revoking probation, affirmed.

Molly J. Huskey, State Appellate Public Defender; Nicole Owens, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

In this consolidated appeal Brandon John Toler challenges the district court's order denying his motion to suppress evidence after he was charged with possession of methamphetamine. He also challenges the sentence imposed in that case as well as the district court's order revoking probation in an earlier case in which Toler was convicted of possession of marijuana. We affirm.

I.
BACKGROUND

In 2001, Toler pled guilty to possession of marijuana with intent to deliver and received a unified sentence of five years with two years fixed. The district court retained jurisdiction, however, and after Toler successfully completed his rider, the court suspended his sentence and placed him on probation. Approximately one and a half years later, Toler admitted to violating

the terms and conditions of his probation by using controlled substances on more than one occasion, possessing drug paraphernalia, having contact with a fugitive, failing multiple times to report for probation, and failing to pay the costs of supervision. The court nevertheless continued Toler on probation and, per Toler's request, ordered that he attend a treatment program in the state of Washington. Toler successfully completed the treatment program. Toler's probation was transferred to Washington, but approximately one year later, he absconded from supervision.

After hearing from neighbors of Toler's grandmother that Toler was back in Idaho, and hearing from confidential informants that Toler had been dealing drugs out of his grandmother's residence in Pocatello, the Idaho probation officer previously assigned to Toler went to the grandmother's residence to try to find him. When the probation officer, Julie Guiverson, knocked on the door, Toler's grandmother answered. Without identifying herself as a probation officer, the officer asked whether Toler was there, and the grandmother responded that he was sleeping in the basement and had been living there for two weeks. The grandmother then invited Officer Guiverson into the residence and asked whether she wanted to speak with Toler. When Officer Guiverson responded that she wanted to wait for other officers before speaking to him, the grandmother became upset, apparently only then recognizing Guiverson as her grandson's probation officer. After two police officers had arrived, Guiverson and the other officers went into the basement where they found Toler asleep on a couch. They arrested him for absconding and seized a methamphetamine pipe that was in plain view nearby. Upon questioning, Toler admitted that the pipe was his and that he had been using illegal drugs. Toler was subsequently charged with possessing methamphetamine in Docket No. 32870.

Toler moved to suppress evidence seized during the officers' entry into the grandmother's basement. He argued that the evidence was the product of an unlawful entry and search of the residence. The district court denied his motion, finding that Toler's grandmother had consented to the entry and search of her home by the officers. Toler then entered a conditional guilty plea to possession of methamphetamine, reserving the right to appeal the suppression ruling. The district court imposed a unified seven-year sentence with a four and one-half-year determinate term.

In the prior marijuana possession case, Toler admitted to having violated his probation, and the district court revoked probation, ordering into execution the previously suspended sentence. The court ordered that the sentences in the two cases would be served concurrently.

Toler now appeals, challenging the denial of his suppression motion, the reasonableness of his sentence in the methamphetamine case, and the order revoking probation in the marijuana case.

II.
ANALYSIS

A. Suppression Motion

The Fourth Amendment guarantee against unreasonable searches is implicated when police search things or places in which the defendant has a reasonable expectation of privacy. *Minnesota v. Olsen*, 495 U.S. 91, 95-96 (1990); *State v. Christensen*, 131 Idaho 143, 146, 953 P.2d 583, 586 (1998); *State v. Morris*, 131 Idaho 562, 565, 961 P.2d 653, 656 (Ct. App. 1998). Warrantless searches of residences are per se unreasonable unless they come within one of the narrowly drawn exceptions to the warrant requirement. *California v. Acevedo*, 500 U.S. 565, 580 (1991); *State v. Henderson*, 114 Idaho 293, 295, 756 P.2d 1057, 1059 (1988). One such exception applies when the search was conducted with the consent of a person having authority over the place or thing searched. *State v. Johnson*, 110 Idaho 516, 522, 716 P.2d 1288, 1294 (1986); *State v. Abeyta*, 131 Idaho 704, 707, 963 P.2d 387, 390 (Ct. App. 1998). It is the State's burden to prove that voluntary consent was given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

In reviewing the trial court's decision on a suppression motion, we defer to the trial court's findings if they are supported by substantial evidence, but we exercise free review in determining whether, on the facts found, the search complied with Fourth Amendment standards. *State v. Hawkins*, 131 Idaho 396, 400, 958 P.2d 22, 26 (Ct. App. 1998).

Toler contends that the district court's denial of his suppression motion should be reversed because the court's finding that his grandmother consented to the search of the home is not supported by substantial evidence. Having reviewed the entire evidentiary record on Toler's suppression motion, we are constrained to agree. Although Officer Guiverson's testimony provides support for a finding that Toler's grandmother consented to Guiverson's entry into the home, there is no evidence that the grandmother consented to any further intrusion into the house

or any search until after officers had already gone into the basement and arrested Toler. Officer Guiverson's testimony does not even imply that she ever sought, much less received, such permission. Therefore, we conclude that the district court's denial of the suppression motion cannot be affirmed on the basis that the warrant requirement was obviated by the grandmother's consent to the search of her basement.

We must therefore consider the alternative basis to uphold the search which is urged by the State. The State contends that because Toler was on probation, he had a reduced expectation of privacy, making it permissible for his probation officer to search his person or property without consent if the officer had reasonable grounds to believe that Toler had violated terms of his probation.[1] The State's argument is supported by longstanding Idaho law. In *State v. Pinson*, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983), this Court considered the constitutional validity of a warrantless, nonconsensual search of a probationer's residence. After substantial discussion of authorities from other jurisdictions addressing the validity of warrantless searches of the persons or property of probationers or parolees, we reached the following conclusion:

> For proper supervision of a probationer, a probation officer is required to know more than merely whether the probationer is law abiding. He must also know that the probationer is not involved in activities or associations prohibited by the probation agreement. These considerations give rise to a need for a probation officer to know that the probationer is complying with all terms and conditions of probation. Accordingly, we hold that a probation officer may make a warrantless search of a probationer if (a) he has reasonable grounds to believe that the probationer has violated some condition of probation and (b) the search is reasonably related to disclosure or confirmation of that violation.

Id. at 233, 657 P.2d at 1101. Subsequently, the Idaho Supreme Court held that nonconsensual warrantless searches of probationers and their property by probationer officers "constitute an exception to the warrant requirement independent of consent." *State v. Klingler*, 143 Idaho 494, 497, 148 P.3d 1240, 1243 (2006). *See also State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987) (Probationers and parolees "have a reduced expectation of privacy, thereby rendering intrusions by government authority 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts.") *Pinson* stands as

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[1] Toler may have agreed to warrantless searches of his person, residence and other property as a condition of his probation, but the State did not place any such probation order or agreement into evidence and therefore cannot rely upon it as a justification for the warrantless search conducted here.

unchallenged precedent in this state, and Toler has made no argument to this Court that *Pinson* should be overruled or has been invalidated by any subsequent authority. Indeed, Toler filed no reply brief responding to any of the State's arguments.

Probation Officer Guiverson clearly had reasonable grounds to believe that Toler had violated a condition of his probation, for she knew that he had absconded from supervision in Washington. She also had reasonable suspicion that he was violating controlled substance laws based on information from neighbors that Toler was residing with his grandmother and that people were "coming and going from [that] residence at all hours," confidential informants' reports that he had been dealing drugs out of his grandmother's residence, and the officer's knowledge of Toler's history of drug use. The officers limited their search to finding Toler and finding evidence related to his suspected probation violations, and they seized only evidence relevant to those violations. Under the standards adopted in *Pinson*, the search was not unlawful. Therefore, the district court did not err in denying Toler's suppression motion.

B. Sentencing Issues

Toler next argues that the district court abused its discretion in revoking his probation in the marijuana case and in imposing sentence in the methamphetamine case. It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. Idaho Code §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is (1) achieving the goal of rehabilitation and (2) consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325, 834 P.2d at 327.

Sentencing is also a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of a sentence are well

established and need not be repeated here. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). When we review a sentence that is ordered into execution following a period of probation, we do not base our review upon the facts existing when the sentence was imposed. Rather, we examine all the circumstances bearing upon the decision to revoke probation and require execution of the sentence, including events that occurred between the original pronouncement of the sentence and the revocation of probation. *Adams*, 115 Idaho at 1055, 772 P.2d at 262; *State v. Grove*, 109 Idaho 372, 373, 707 P.2d 483, 484 (Ct. App. 1985); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982). Applying these standards we find no abuse of discretion by the district court with respect to the sentence imposed in the methamphetamine case or in the revocation of Toler's probation in the marijuana case.

III.
CONCLUSION

For the foregoing reasons, we affirm the order denying Toler's suppression motion, his sentence for possession of methamphetamine, and the order revoking probation and executing Toler's sentence for possession of marijuana.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**